No. 96-1133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

AIRMAN EDWARD G. SCHEFFER, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether Military Rule of Evidence 707, which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, is an unconstitutional abridgement of military defendants' right to present a defense.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Supreme Court Cases

Federal Cases

Military Cases

Federal Statutes:

Uniform Code of Military Justice, 10 U.S.C. 801 *et seq*

Manual for Courts-Martial (MCM) United States

State Cases

Miscellaneous

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 44 MJ 442 (1996), is located at Pet. for Cert. App. A. The opinion of the United States Air Force Court of Criminal Appeals, reported at 41 MJ 683 (AF Ct. Crim App 1995), is located at Pet. for Cert. App. B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 18 September 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867a.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."

STATEMENT OF THE CASE

Petitioner's Statement of the Case is accepted except where noted.[1] On 10 April 1992, three days after voluntarily provid-

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[1] Contrary to Petitioner's Brief at 7, the respondent was actually asked to provide a urine sample on 6 April 1992. J.A. 9. Though the respondent was unable to provide a sample that day because he urinated infrequently, this fact was no surprise to the OSI agents. During cross examination, the primary agent admitted that he knew as early as 10 March 1992 that the respondent indicated he only urinated infrequently. Record 128. He gave the sample the next day at approximately 8:00 a.m. Record 120. The respondent also voluntarily gave a urine sample on 10 March 1992 but no illegal drugs were detected. Record 127-128.

ing a urine sample to agents of the Air Force Office of Special Investigations (AFOSI), the Air Force requested and the respondent agreed to take an AFOSI polygraph exam and did so the same day. The examination was administered by a government certified OSI polygraph examiner. The examiner asked three relevant questions: (1) Since you've been in the AF, have you used any illegal drugs?; (2) Have you lied about any of the drug information you've given OSI?; and (3) Besides your parents, have you told anyone you're assisting OSI? Respondent answered "No" to each question. In the examiner's opinion, there was no deception indicated (NDI) in respondent's responses. (J.A. 12.)

After he testified at trial, respondent attempted to introduce the results of this polygraph examination to support his testimony that he did not knowingly use drugs. The military judge ruled that the respondent could not even attempt to lay a foundation to admit the polygraph (J.A. 28, 49) because of Mil. R. Evid. 707 which states:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
>
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

On appeal, the Air Force Court of Criminal Appeals affirmed the respondent's conviction. The United States Court of Appeals for the Armed Forces reversed, holding Mil. R. Evid. 707 was unconstitutional to the extent it denied an accused the opportunity to admit exculpatory scientific evidence. "We do not now hold that polygraph examinations are

scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the *per se* rule against admissibility." Pet. for Cert. App. A, p. 11a.

SUMMARY OF ARGUMENT

The Court of Appeals for the Armed Forces' narrowly tailored holding—which "merely remov[ed] the obstacle of the *per se* rule [of Military Rule of Evidence 707] against admissibility" of an accused's exculpatory polygraph examination, offered by an accused who has testified and had his credibility attacked—should be affirmed.

I. Military Rule of Evidence 707 infringes upon a military accused's Sixth Amendment right to present a defense. It prevents an accused from laying a foundation for the admission of an exculpatory polygraph examination, even after his credibility has been attacked on cross-examination. The exclusion applies even if the evidence is both relevant and reliable under the particular facts of an accused's case.

The President's interest in barring unreliable evidence does not extend to a *per se* exclusion of evidence that has been shown to be reliable and relevant in an individual case. The United States has the burden of establishing the constitutionality of its *per se* exclusionary rule of evidence because "[w]holesale inadmissibility . . . is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all [testimony]." *Rock v. Arkansas*, 483 U.S. 44, 61 (1987).

II. In *United States v. Gipson*, 24 MJ 246 (CMA 1987), the United States Court of Appeals for the Armed Forces ruled that polygraph examinations may be admissible under Mil. R. Evid. 702, depending on the particular circumstances of the case, the competency of the examiner, the nature of the partic-

ular testing process employed, and other such factors. *Id.* at 253. For the next four years, most military cases in which polygraph evidence was an issue involved an accused's attempt to lay a foundation for the admissibility of an exculpatory polygraph. Mil. R. Evid. 707 was created in 1991 because the drafters believed that: court members would be misled by polygraph evidence that was likely to be shrouded "with an aura of near infallibility in all cases;" that court members would abandon their responsibility to ascertain the facts and adjudge guilt or innocence; that court members would become confused about the issues in a case; that the admission of polygraph evidence would result in a substantial waste of time and place a burden on the administration of justice; and that the reliability of polygraph evidence had not been sufficiently established. Manual for Courts-Martial, (MCM), United States, App. 22, p. A22-48 (1995 ed.)

Mil. R. Evid. 707 is arbitrary and invalid because polygraphs have been shown to be sufficiently reliable on the basis of current research and real life experience. Further, the Federal government, law enforcement agencies, and the Department of Defense in particular, rely on polygraph results daily in criminal investigations and matters of national security.

Research and experience have also shown that polygraph evidence does not mislead or confuse juries, nor usurp their role. Nor is the admission of polygraph evidence an unjustifiable burden on the administration of justice, particularly in respondent's case, where the polygraph examination was administered by a government certified polygraph examiner at the government's request and no conflicting polygraphs were involved. Further, the courts have allowed highly complex and technical evidence, in this case urinalysis evidence, to be routinely admitted against an accused.

Most jurisdictions in the United States do not have analogous *per se* exclusionary rules regarding polygraph evidence. In the

federal system, the majority of circuits allow an accused to lay a foundation for the admission of his own polygraph examination.

New Mexico has admitted polygraph evidence without significant restrictions for the past twenty two years. Its experience demonstrates that the reasons set forth for the creation of Mil.R.Evid. 707 are arbitrary and invalid.

III. Finally, Mil. R. Evid. 707 is not entitled to any special deference by this Honorable Court because of the special or "unique" needs of the Armed Forces. In creating Mil. R. Evid. 707, the drafter's analysis to the rule did not discuss any such concern prompting creation of the rule. No special needs of the military were at issue in respondent's case, where the government had two alternative ways of checking whether respondent had used drugs — the polygraph exam which it requested and the urinalysis test which it also requested. As a result of its rules of evidence, only the incriminating results could be admitted at respondent's court-martial.

Polygraph evidence is sufficiently reliable and relevant to be constitutionally required when offered by an accused in his defense, after he has testified and his credibility has been attacked. An evidentiary rule of exclusion that forever bars an accused from establishing the relevancy and reliability of such evidence under such circumstances is unconstitutional.

ARGUMENT

I. The *Per Se* Rule Of Exclusion Of Polygraph Evidence Directed By Military Rule Of Evidence 707 Violates Respondent's Sixth Amendment Right To Present A Defense

"Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." — Justice Potter Stewart[2]

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[2] *Hawkins v. United States*, 358 U.S. 74, 81 (1958).

The United States argues that a *per se* rule of inadmissibility barring an entire category of scientific evidence, which numerous courts have found to be reliable and relevant, is constitutionally permissible. In *United States v. Posado*, 57 F.3d 428, 432 (5th Cir. 1995), the United States agreed that a *per se* rule against admitting polygraph evidence was no longer viable after *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Respondent believes the United States' position in *Posado* is the correct approach for a constitutional analysis.

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Rock v. Arkansas*, 483 U.S. 44, 52 (1987).

The combined effect of the Amendments is a requirement that criminal defendants be afforded "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). An accused must be given a fundamentally fair trial in which he is afforded "an opportunity to be heard in his defense—a right to his day in court." *In Re Oliver*, 333 U.S. 257, 273 (1948); see also, *California v. Trombetta*, 467 U.S. 479, 485; (1984); *Washington v. Texas*, 388 U.S. 14 (1967).

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). As this Honorable Court noted in *Taylor*:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on partial or speculative presentation of the facts.

Id. at 408-409. Mil. R. Evid. 707 violates this fundamental right by automatically denying any accused an opportunity to even attempt to lay a foundation for the admission of exculpatory scientific evidence at his court-martial, either during findings or as mitigation evidence in sentencing, and to present that favorable evidence if the proper evidentiary foundation is established. [3]

The Supreme Court provided a framework for addressing this issue in *Rock*:

> . . . restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitations imposed on the defendant's constitutional right to testify . . . . Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the

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[3] It cannot be overemphasized that Mil. R. Evid. 707 bars polygraph evidence in all situations, even if an accused attempts to admit a polygraph examination as mitigation evidence during the sentencing phase of his death penalty case. In *Lankford v. Idaho*, without reaching the admissibility of polygraph evidence in capital sentencing hearings, this Court acknowledged constitutional principles and persuasive argument of such evidence in the context of a capital case. 500 U.S. 110, 124 n.19 (1991) (noting that had petitioner been adequately notified of the capital character of his sentencing judge to consider polygraph evidence in mitigation based

> *absence of clear evidence by the State repudiating [its] validity . . . .*

483 U.S. at 55-56.

In *Rock*, this Court reversed a state court opinion that relied on a *per se* exclusionary rule without regard to the rights of the defendant. The defendant was charged with manslaughter based upon the shooting death of her husband. Because the defendant could not remember the precise details of the shooting, her attorney suggested that she submit to hypnosis in order to refresh her memory. She was, in fact, hypnotized twice but did not relate any new information during either of the sessions. After the hypnosis, however, she remembered details of the shooting that were corroborated by other evidence in the case.

At the time of her trial, Arkansas had a *per se* exclusionary rule that did not allow the trial court to consider whether post-hypnosis testimony was admissible in a particular case. Acting on the government's pretrial motion, the trial court issued an order limiting the defendant's testimony to matters remembered and stated to the examiner prior to hypnosis.

In reviewing the scientific validity of hypnosis, this Court noted that " . . . there is no generally accepted theory to explain the phenomenon, or even a consensus on a single definition of hypnosis. The use of hypnosis in criminal investigations, however, is controversial, and the current medical and legal view of its appropriate role is unsettled." 483 U.S. at 59 (citation and footnote omitted).

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on Supreme Court precedent) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978) which stated, " . . . a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable. . . .") Mil. R. Evid. 707 would exclude polygraph evidence by a military accused in such a case.

Moreover, the Court stated that "[w]e are not now prepared to endorse without qualifications the use of hypnosis as an investigative tool; scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy." 483 U.S. at 61. Nonetheless, the Court declared:

> Arkansas, however, has not justified the exclusion of all of a defendant's testimony that the defendant is unable to prove to be the product of prehypnosis memory. A State's legitimate interest in barring *unreliable evidence does not extend to per se exclusions that may be reliable in an individual case*. Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of *all* posthypnosis recollections.

483 U.S. at 61 (emphasis added).

Petitioner attempts to distinguish *Rock*, as do various courts (*see* Brief of the State of Connecticut and 27 States as Amici Curiae, 10 n.6), by arguing that *Rock* dealt with an accused's right to testify, not a defendant's right to present witnesses in his defense. Brief for Petitioner, at 35. Such an argument, however, ignores the fact that an accused has a fundamental, constitutional right to present a defense–to call witnesses—not merely a right to testify. *Chambers*, 410 U.S. at 302. Both rights are "fundamental." The Sixth Amendment, on its face, is silent about an accused's right to testify in his own behalf. At the time the Constitution was adopted, the common law disqualification of parties as witnesses, and the disqualification of a defendant to testify in his own behalf, had existed for years. An accused, though, was allowed to call witnesses in his behalf. *Ferguson v. Georgia*, 365 U.S. 570, 573 (1961). Historically, the right to call witnesses by an accused can be

said to be more fundamental than the right to testify. Respondent does not believe the *Rock* decision would have been different if it involved the hypnotically refreshed testimony of a witness who, after hypnosis, recalled that he, and not the accused, committed the crime and was willing to so testify.

The holding of this Court in *Rock* should apply with at least equal force to polygraph evidence, which is less controversial than hypnotically induced testimony. Although the current "legal view of its appropriate role is unsettled," blanket denial of a defendant's opportunity to lay a foundation for the admissibility of polygraph evidence is not justified. As with posthypnosis testimony, the United States attempts to bar defense exculpatory evidence "without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced." *Id.* at 56. A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions of evidence that may be reliable in an individual case in the absence of clear evidence by the State to the contrary. *Id.* at 61.

A few courts have held it is not unconstitutional to bar polygraph evidence that is favorable to the defense because they believe polygraph evidence has not been "generally accepted" as reliable. See, e.g. *United States v. Alexander*, 526 F.2d 161, 166 (8th Cir. 1975); *People v. Price*, 1 Cal.4th 324, 821 P.2d 610, 663 (1991); *State v. Black*, 109 Wash. 2d 336, 346-47, 745 P.2d 12 (1987). These decisions overlook that polygraph evidence is sufficiently reliable in particular cases, and can be very critical to a defendant's case. "In a given case, this Court's decisions may require that exculpatory evidence be admitted into evidence despite state evidentiary rules to the contrary." *Israel v. McMorris*, 455 U.S. 967 (1982) (Rehnquist, C.J., O'Connor, J., dissenting to denial of *certiorari*).

In *Washington v. Texas*, the defendant was convicted of murder with malice. At trial, he attempted to call Charles

Fuller, a co-participant in the same murder. Fuller would have testified that the defendant tried to persuade him to leave, and that the defendant ran away before Fuller shot the victim. At trial, two Texas statutes prohibited Fuller, a co-participant, from testifying for the defendant. This Honorable Court held that the defendant was denied his right to compulsory process because "the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events he had personally observed, and whose testimony would have been relevant and material to the defense." *Washington*, 388 U.S. at 23.

The teaching of *Chambers v. Mississippi*, is that evidentiary rules "may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302. In *Chambers*, the defendant was convicted of murdering a policeman. After his arrest, but prior to trial, another man, McDonald, confessed to the murder in a sworn, written statement and in unsworn, oral statements to others on three separate occasions. McDonald was called as a defense witness, but repudiated his sworn statement. The defendant was unable to present a defense by cross-examining him due to a state rule preventing a party from impeaching its own witness. McDonald's oral confessions to others were excluded from evidence as inadmissible hearsay. This Court held that although the defendant was able to "chip . . . away at the fringes" of McDonald's story by the admission of other evidence, his defense was "far less persuasive than it might have been had he been given an opportunity" to present a complete defense. 410 U.S. at 294. This Court held that the combination of the two evidentiary rules as applied in *Chambers* denied the defendant his right to a fundamentally fair trial. 410 U.S. at 303. See also *Crane v. Kentucky*, 476 U.S. 683 (1986) (exclusion of testimony about the circumstances of a confession deprived the defendant of his right to present a defense); *Davis v. Alaska*, 415 U.S. 308 (1974) (petitioner's

right of confrontation is paramount to the State's rule prohibiting cross-examination of government witness concerning his probationary status as a juvenile delinquent).

In *Michigan v. Lucas*, 500 U.S. 145 (1991), the defendant was tried for the rape of his ex-girlfriend. Michigan had a "rape-shield" law designed to protect victims of rape from harassing or irrelevant questions concerning their past sexual behavior. An exception to this rule allowed admission of evidence that was materially relevant, such as the defendant's past sexual conduct with the victim, provided that he followed certain notice procedures. The defendant did not give the required notice but at trial sought to admit the evidence of his past sexual conduct with the victim. The trial court refused to allow the evidence and the Michigan Court of Appeals reversed, finding the exclusion based on a notice requirement *per se* unconstitutional. This Court held that the notice requirement can justify the exclusion of such evidence, in some cases. It did not decide whether the preclusion in that case was proper. Contrary to petitioner's argument, (Brief for Petitioner, at 15) the statutory notice requirement did not prohibit exculpatory evidence from being admitted by the defense but only placed a procedural prerequisite accelerating the timing of the disclosure to the prosecution. The rule did not *per se*, under all circumstances, exclude the evidence. See *Williams v. Florida*, 399 U.S. 78 (1970) (notice requirement to present alibi defense).

Respondent recognizes that an accused's right to present relevant evidence is not absolute. As in *Lucas*, this Court has noted that procedural and evidentiary rules control the presentation of evidence. *Rock*, 483 U.S. at 55 n.11; *Washington v. Texas*, 388 U.S. at 23, n.21; *Montana v. Egelhoff*, __ U.S. __, 116 S.Ct. 2013, 2022 (1996). This Court has indicated that, *in any particular case*, evidence may be excluded "through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see the evidence admitted," *Crane*, 476 U.S. at 690. This rationale, however, should not extend to *per se* exclusions of an *entire class* of exculpatory evidence.

Petitioner argues Mil. R. Evid. 707 does not abridge the Sixth Amendment by analogizing it to several standard rules of evidence that prohibit the admission of relevant, exculpatory evidence, such as Fed. R. Evid. 403, 404(b), 501, 702, 704, and 802. Brief for Petitioner, at 15-17. However, such rules do not set up *per se* bars to the introduction of the underlying evidence in all cases. For example, the hearsay rules do not exclude the underlying evidence when otherwise admissible and include a number of exceptions that allow consideration of hearsay evidence. Similarly, Fed. R. Evid. 403 excludes unduly prejudicial evidence on a case by case basis. Fed. R. Evid 404(b) does not, as petitioner claims, *per se*, exclude evidence of other crimes or wrongs. The rule, instead, permits such evidence to prove among other things, bias, motive, intent, preparation, plan, knowledge, identity, and opportunity. Further, Fed. R. Evid. 405(b) allows specific instances of conduct to prove character when a trait of character is an essential element of an offense or *defense*. Though evidentiary rules may sometimes exclude relevant, exculpatory evidence, there are limits that prevent the exclusion of entire categories of evidence for all time. *Montana v. Egelhoff*, __ U.S. __, 116 S.Ct. at 2017 (1996).

The constitutional infirmity of Mil. R. Evid. 707 is vividly demonstrated by its unfair application in the respondent's trial. Here, the government itself asked Airman Scheffer to consent to a polygraph examination in order for him to continue operating as their undercover source. Pet. for Cert. App. 2a; J.A. 10. He agreed to do so and on 10 April 1992, three days after consenting to the OSI agent's request to take a urinalysis test, passed the OSI's polygraph examination. J.A. 11-12. All this

took place one month before he was accused of illegally using methamphetamine, based on the results of his urinalysis. J.A. 2. Though the prosecution had two disparate pieces of evidence on the issue of knowing drug use, they offered only those results inculpating Airman Scheffer. To further exacerbate this unfairness, the prosecution opposed the defense's attempt to lay a foundation to admit his exculpatory polygraph. After the military judge refused to admit the exculpatory evidence, applying Mil. R. Evid. 707's *per se* ban, the prosecution presented its case-in-chief that included more than three hours of testimony by their drug testing expert. Record 152-199. Airman Scheffer testified, denying he knowingly ingested methamphetamine. J.A. 34. He was then cross-examined by the trial counsel. J.A. 35-47.

After the presentation of evidence, the military judge instructed the members, "[u]se of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary." Record 334. During closing argument, the trial counsel asserted this permissive inference in trying to persuade the members to convict Airman Scheffer. J.A. 54-55. Knowing full well respondent passed his polygraph, trial counsel vigorously and repeatedly argued Airman Scheffer was a "liar," had no "credibility," and should not be believed. J.A. 57, 61-62.[4] "The only way you can find him not guilty of these offenses, is if you believe his story." J.A. 62.

Airman Scheffer was not given a chance to further explain why the court members should believe his story. Respondent's polygraph examination was relevant, reliable, exculpatory evidence that would have assisted the court members in making an informed decision as to whether he was worthy of belief.

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[4] Trial counsel summed up his argument by declaring "[t]he only way you can find him not guilty of these offenses, is if you believe his story. If you are to believe that, this time he is telling the truth. Maybe he lied in the past. But, he's telling us the truth now. That's the only way." J.A. 62.

Mil. R. Evid. 707's *per se* ban on the admission of the respondent's polygraph results violated his right to present a defense under the 6th Amendment.

II. The Reasons Set Forth For The Creation Of Military Rule of Evidence 707 Are Neither Reasonable Nor Valid And Do Not Overcome A Defendant's Sixth Amendment Right To Present A Defense

Mil. R. Evid. 707 was promulgated in 1991. Prior to its adoption, the then named Court of Military Appeals decided the case of *United States v. Gipson*, 24 MJ 246 (CMA 1987). The Court held that polygraphs could be admissible under Mil. R. Evid. 702, assuming a proper foundation had been laid by the proponent. During the next four years, military appellate courts decided approximately nine cases involving the admissibility of polygraph evidence. Overwhelmingly, the cases dealt with an accused attempting to lay a foundation for the admission of an exculpatory polygraph.[5] These cases are strong empirical evidence that Mil. R. Evid. 707 was created to prevent what was the clear trend involving the admission of polygraph evidence in courts-martial after *Gipson*—an accused's attempt to lay a foundation for the admission of exculpatory polygraph evidence.

The drafter's analysis to Mil. R. Evid. 707 sets forth five reasons for the *per se* exclusion of polygraph evidence:

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[5] *Gipson, supra*; *United States v. Howard*, 24 MJ 897 (CGCMR 1987), pet. denied, 26 MJ 231 (CMA 1988) (defense evidence); *United States v. Abeyta*, 25 MJ 97 (CMA 1987), cert. denied, 484 U.S. 1027 (1988) (defense evidence); *United States v. Berg*, 32 MJ 141 (CMA 1991) (defense evidence); *United States v. Jensen*, 25 MJ 284 (CMA 1987) (defense evidence); *United States v. Pope*, 30 MJ 1188 (CMA 1990), pet. denied, 32 MJ 249 (CMA 1990) (defense evidence); *United States v. Blanchard*, ACM 28428, (ACMR 1991) (defense evidence); *United v. Rodriquez*, 37 MJ 448 (CMA 1993) (gov't evidence); *United States v. Baldwin*, 25 MJ 54 (CMA 1987) (gov't evidence).

. . . There is real danger that court members will be misled by polygraph evidence that "is likely to be shrouded with an aura of near infallibility . . . ." To the extent that the members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members' "traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted." . . . There is also a danger of confusion of the issues, especially when conflicting polygraph evidence diverts members' attention from a determination of guilt or innocence to a judgment of the validity and limitations of polygraphs . . . . Polygraph evidence can also result in a substantial waste of time . . . [and] places a burden on the administration of justice that outweighs the probative value of the evidence. The reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system.

MCM, United States, 1984, App. 22, p. A22-48, (citations omitted). None of these reasons justify a *per se* rule excluding polygraph evidence in all cases.

A. The Reliability Of Polygraphs Has Been Sufficiently Shown In The Scientific Community

In 1923, James Frye was accused of murdering a doctor. Later, Dr. William Marston placed a blood pressure cuff around one arm and measured Frye's systolic blood pressure at different intervals in response to a series of questions. Marston concluded that Frye answered truthfully when he denied killing the doctor. S. Abrams, *The Complete Polygraph Handbook*, p. 3 (1989). The court refused to admit this evi-

dence, finding the procedure involved was not generally accepted in the scientific community in 1923. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Despite the resulting stagnant judicial approach to polygraph evidence, the *science* of the polygraph testing advanced steadily through the years. Today, the instrumentation, methodology, training, and quality control associated with polygraph testing have advanced to a point that would be unrecognizable to the *Fyre* court.

Though the petitioner attempts to persuade this Honorable Court that polygraph testing is unreliable (Brief for Petitioner, at 18-26), this broad declaration fails to withstand careful scrutiny. The psychophysiological detection of deception,[6] commonly called the polygraph examination, has evolved over a period of more than seventy years to become a valid and reliable means of resolving questions of deception.

Contrary to petitioner's argument, leading practitioners in the field of polygraph fiercely support its use, utility and reliability, particularly the Department of Defense. See generally AFOSI Pamphlet 71-125, *The Air Force Commanders' Guide to the USAF Polygraph Program*, April 1997 (B. Stern). The Department of Defense (DoD) has been using the polygraph for almost half a century and views the polygraph as " . . . clearly one of our most effective investigative tools."[7] Within DoD the

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[6] The term "psychophysiological detection of deception" or PDD has been part of scientific literature since 1921. However, the term "polygraph" was generally accepted. W. Yankee, *A Case for Forensic Psychophysiology and Other Changes in Terminology*, undated. With the scientific, technological and other recent advancements that have occurred with the polygraph, including use of computerized polygraph instrumentation, scoring algorithms, formal quality assurance and continuing education programs, PDD is a more accurate and descriptive term. AFOSI Pamphlet 71-125, *The Air Force Commanders' Guide to the USAF Polygraph Program*, April 1997 (B. Stern).

[7] *Fiscal Year 1996 DoD Polygraph Program Annual Polygraph Report to Congress*, Office of the Assistant Secretary of Defense (OASD) for Command, Control, Communications, and Intelligence (C3I), Executive Summary, p. 8.

polygraph is used in criminal and counterintelligence investigations, foreign intelligence and counterintelligence operations, exculpation requests, and as a condition for granting access to certain sensitive positions, information or facilities. *Ibid.*

A polygraph examination consists of four distinct phases: (1) pretest, (2) in-test, (3) test-data-analysis and (4) post-test. During the pretest phase, the examiner lays the foundation for the entire examination and comprehensively reviews, with the examinee, each question to be asked during the in-test phase of the examination.[8] When questions are posed during the in-test phase, the examinee will subjectively analyze each question and attach a certain degree of significance to it. The examinee will then cognitively process that information further and consciously decide whether to answer the question truthfully. While the examinee is going through this evaluation process, there is a corresponding involuntary physiological change brought about by the sympathetic branch of the body's autonomic nervous system.[9] This is recorded by the physiological sensors of the polygraph instrument and subsequently analyzed during the test-data-analysis phase. W. Yankee, *supra*, at 1; AFOSI Pam 71-125, *supra*, p. 12, 25.

Typically, there are three types of physiological recording sensors used during a polygraph examination: (1) pneumograph, (2) electrodermal, and a (3) cardiovascular sensor. The pneumograph sensor records respiration and consists of two rubber tubes placed across an examinee's upper thoracic cavity and diaphragm.[10] The electrodermal sensor records sweat

[8] See Department of Defense Polygraph Institute (DoDPI), Forensic Sciences Course 501, *Pretest Interview* Student Handout, Nov 94.

[9] Petitioner's Brief at 3 incorrectly refers to the autonomic nervous system as the "autonomous" nervous system.

[10] Petitioner's Brief at 3 suggests that a standard polygraph examination utilizes only one pneumograph sensor. The DoDPI teaches examiners to use two pneumograph tubes because it is well established that the intercostal muscles (located in the chest or thoracic cavity) respond to different nerve innervation than does the diaphragm. D. Weinstein, *Anatomy and Physiology for the Forensic Psychophysiologist*, June 1994 (Revised).

gland activity (palmar sweating) through two finger plates placed on the underside of an examinee's hand. The cardiovascular sensor records mean arterial blood pressure, heart rate, blood volume changes and other associated cardiovascular activity by using a standard medical blood pressure cuff (typically on the upper arm but can be placed elsewhere on the body). D. Weinstein, *Anatomy and Physiology for the Forensic Psychophysiologist*, June 1994 (Revised).

There are three general types of questions used in polygraph examinations. The first type is called "relevant questions," which pertain directly to the issue under investigation (e.g., "Did you shoot Sharon?").[11] Relevant questions are used to explore direct or indirect involvement, connection to evidence, or one's guilty knowledge. The second type, "irrelevant questions" (also known as "norm" or "neutral" questions), is non-emotion invoking in nature (e.g., "Are the lights on in this room?"). These questions are used to absorb orientating responses to the onset of questioning, general nervous tension and assist in establishing an examinee's physiological baseline. Finally, "comparison questions," (also known as "probable lie" or "control" questions) are used. These questions explore matters similar in nature to the issue under investigation but are differentiated from relevant questions by a prefatory clause related to time, place or category (e.g., "Prior to 1997, did you ever even think about hurting someone?"). *Ibid.*

[11] Petitioner's Brief at 3 refers to one of the three broad categories of questions asked during a polygraph examination as "direct" questions when, in fact, questions pertaining directly to the issue under investigation are known throughout the research and polygraph community as "relevant" questions. *Test Question Construction* Student Handout, DoDPI, July 1995.

Comparison question tests (CQT) are the most common testing format used in law enforcement[12] and are widely applied in the national security system of the United States.[13] The premise behind the CQT technique is that the guilty and innocent examinee will differ in their physiological reactions to relevant and comparison questions. Innocent examinees are expected to produce greater physiological arousal to comparison questions than to relevant questions. This is because innocent examinees are *certain* of the veracity of their responses to the relevant questions and will either lie, not fully disclose, or be less certain about the veracity of their responses to the comparison questions. The deceptive individual is expected to show greater physiological arousal to the relevant questions. *Ibid.*[14]

Several recognized theories explain the causes of the physiological responses elicited when an examinee is found to be lying or deceptive.[15] The most generally accepted theory is that a deceptive person's response is a result of the fear of detection. Fear is an emotion that results in physiological arousal. The degree of arousal is proportional to the fear experienced by the examinee.

An examiner renders one of four diagnostic opinions during the test-data-analysis phase: (1) No Deception Indicated, (2) Deception Indicated, (3) Inconclusive, and (4) No Opinion. AFOSI Pam. 71-125, *supra*, p. 20. The original examiner's

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[12] G. Barland, *Standards for the Admissibility of Polygraph Evidence*, 16 U. West. L.A. L. Rev. 37, 46 (1984).

[13] C. Honts, D. Raskin, and J. Kircher, *Mental and Physical Countermeasures Reduce the Accuracy of Polygraph Tests*, 79 Journal of Applied Psychology, 79 (1994).

[14] See also J. Reid and F. Inbau, *Truth and Deception: The Polygraph (Lie Detector Technique)*, at 28 (1973).

[15] G. Barland, *Theories of Detection of Deception* Handout, DoDPI, (1982). Dr. Barland's handout is a comprehensive evaluation of the predominate theories surrounding the detection of deception, two of the most accepted theories, fear of detection and psychological set theory, are addressed in this Brief.

opinion, at least within the Air Force and most federal government agencies, can only be authenticated after one, and often two, independent layers of quality control review.[16]

During the post-test phase, the examiner advises the examinee of his or her diagnostic opinion. If no deception is indicated, the examination is complete. If deception is indicated the examiner will often attempt to ascertain the reason for the deceptive results. If the results are "inconclusive," additional testing may be conducted until the matter under investigation is resolved. If for any reason the examination is stopped and a conclusive diagnostic opinion cannot be made, the examiner will render a "no opinion" decision. AFOSI Pam. 71-125, *supra*, at 20-21.

Numerous studies have been conducted on polygraph testing.[17] Current research demonstrates that polygraph testing is scientifically reliable and represents a valid measure of an examinee's deceptiveness or lack thereof. Research into the validity of polygraph examinations essentially falls into 2 types of experimentation—laboratory and field studies.[18]

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[16] The Air Force Office of Special Investigations is the executive agency for the Air Force Polygraph Program. Within the Air Force, there are two layers of quality control review. The first review is conducted at the operational field level by the examiner's field supervisor. The second and final quality control review is accomplished at the Air Force Polygraph Program Office. AFOSI Instruction 71-117, *Specialized Investigative Services*, 17 December 1996.

[17] See generally, N. Ansley, *Compendium on Polygraph Validity*, 12(2) Polygraph 53-61 (1983); N. Ansley, *The Validity and Reliability of Polygraph Decisions in Real Cases*, 19(3) Polygraph 169-181 (1990).

[18] Since lab studies use a mock crime to assess whether the examinees are being deceptive, such studies have the advantage of knowing the "ground truth" of which examinee "committed" the crime in question. However, such examinees are not facing the real life prospect of criminal prosecution and, therefore, do not present the same degree of physiological stimulation as a real-life suspect. As for field studies, "ground truth" may be difficult to ascertain but the examinees display real physiological reactions. S. Abrams, *The Complete Polygraph Handbook*, p. 181-182 (1989).

Most researchers estimate that the polygraph procedure accurately assesses deception or a lack thereof over 90% of the time.[19] Though petitioner's brief relies upon the work of Dr. Lykken to criticize the field of polygraphy in general, Lykken, in fact, *promotes* a particular type of polygraph technique, the guilty knowledge test (GKT). Dr. Lykken firmly believes the GKT technique will accurately determine whether an examinee possesses knowledge of the particulars of a crime only possessed by a guilty person.[20]

Petitioner also cites the 14 year old Office of Technology Assessment (OTA) Study as a basis to conclude that polygraph testing today is invalid and unreliable. The study responded to a request from Congress to review and evaluate then current scientific evidence about the validity of polygraph testing. U.S. Congress, Office of Technology Assessment, *Scientific Validity of Polygraph Testing: A Research Review and Evaluation—A Technical Memorandum* (OTA-TM-H-15, Nov. 1983) (OTA Study). The study, although initially touted as a comprehensive review, was subsequently criticized for use of an improper statistic (the *lambda* statistic) and for treating "inconclusive" test results as errors.[21] The OTA Study substantially undervalued the accuracy of polygraph testing, particularly in its review of various laboratory studies. McCauley and Forman, *A Review of the Office of Technology Assessment Report on Polygraph Validity*, Basic and Applied Social Psychology, 9(2), p. 74, 79 (1988). As such, the petitioner's reliance upon the conclusion of the OTA Study—that poly-

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[19] J. Matte, *Forensic Psychophysiology using the Polygraph*, Pp.121-129 (1996). The author provides an exhaustive survey of the numerous studies and reviews of such studies concerning the various types of polygraph techniques.

[20] D. Lykken, *Detection of Guilty Knowledge, A Comment on Forman and McCauley*, 73 J. App. Psych. 303-304 (1988).

[21] An "inconclusive" opinion simply means that additional testing is required to render a conclusive diagnostic opinion. Therefore, it is not an error for the examiner to render an inconclusive opinion. Ibid.

graph tests in criminal investigations have significant error rates—is undermined by the study's suspect statistic.

Petitioner cites a few judicial opinions that attach significance to the fact that a polygraph test is not replicable. Yet, many types of scientific evidence encounter no judicial resistance simply because a test result is not replicable. For example, the science of handwriting analysis typically involves the comparison of a questioned document with a large number of exemplars. P. Giannelli & E. Imwinkelried, *Scientific Evidence*, §21-2, at 141, 148 (2 ed. 1993). This is essential for two reasons: (1) no person will write a word the same way twice; and (2) if the suspect attempts to disguise his/her true writing style, a large number of exemplars will make such an effort at deception easier to detect. The exemplars are not replicated. Like handwriting analysis, polygraph examinations involve comparisons. It is the differential physiological responses between relevant and comparison questions that a trained examiner is looking for in order to assess an examinee's credibility. As such, truly replicable tests are not necessary to reach an accurate assessment.

Petitioner's argument is further undermined when one considers the universal acceptance of handwriting analysis in courts of law today. *Ibid.* at 179. Despite research that details high error rates—some as high as 87%—among questioned document examiners, courts continue to admit such evidence. *Ibid.* at 180.[22]

Polygraphs have also been compared to other types of evidence. A laboratory study was conducted in 1977 to assess the validity of the CQT technique in comparison to fingerprint identification, handwriting analysis, and eyewitness identifica-

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[22] The referenced study by Professor Denbeaux reported accuracy rates as low as 13%. More recent studies call into question whether the accuracy rate is this low. P. Giannelli & E. Imwinkelried, *Scientific Evidence*, §21-7(A), at 40 (2 ed. 1996 Cumulative Supplement).

tion.[23] The study found the CQT polygraph technique was best able to correctly resolve a mock crime. When the data included "inconclusive" opinions, the polygraph produced a correct result 90% of the time. Polygraph testing was accurate 95% of the time when "inconclusive" opinions were excluded from the data. *Ibid.* at 598. Fingerprint identification, handwriting analysis, and eyewitness identification are all used in trials.[24] Yet, under Mil. R. Evid. 707, polygraph evidence is excluded without exception.

Petitioner expresses a belief that a "highly motivated subject" might employ countermeasures to thwart the examination process. However, research indicates the spontaneous use of countermeasures is ineffective against the CQT technique. C. Honts, D. Raskin, & J. Kircher, *Mental and Physical Countermeasures Reduce the Accuracy of Polygraph Tests*, 79 J. A.Psych. 292 (1994). Additionally, the U.S. Government has spent considerable funds to develop countermeasure detectors. *Ibid.* at 252.[25] Any possible problem with countermeasures in a given test is best explored through the time-honored mechanism of cross-examination. Cf. *Rock*, 483 U.S. at 61.

Other concerns courts have with polygraphs have been resolved through training requirements. The DoD Polygraph Institute[26] (DoDPI) is generally considered to be the best train-

[23] J. Widacki & F. Horvath, *An Experimental Investigation of the Relative Validity and Utility of the Polygraph Technique and Three Other Common Methods of Criminal Identification*, 23 J. Forensic Sci. 596-601 (1978).

[24] By way of contrast, see *State v. Klawitter*, 518 N.W.2d 577 (1994), wherein the Supreme Court of Minnesota had no difficulty admitting prosecution evidence concerning the "horizontal gaze nystagmus" test despite testimony revealing significant criticisms of the technique and subjectivity of the eye test portion of the protocol.

[25] Ongoing research into countermeasures by the Department of Defense is reported annually to Congress.

[26] The DoDPI is a federally funded institution, under the authority, direction and control of the Defense Investigative Service, that provides introductory and continuing education courses in forensic psychophysiology.

ing facility for polygraph examiners in the United States.[27] All Air Force polygraph examiners (including respondent's examiner) must meet stringent qualifications.[28] Additionally, AFOSI examiners must complete the DoDPI basic courses in forensic psychophysiology (14 weeks in length, covering 560 hours of in residence instruction), must conduct approximately 50 polygraph examinations during initial training, and serve a minimum six month internship, under the supervision of a certified examiner. Examiners must also receive 80 hours of continuing education every two years. With such stringent training requirements and testing protocols in place within the DoD, petitioner's claim that polygraph examiners inject a "high degree of subjectivity into the examination" is without merit. Brief for Petitioner at 23.

Respondent was administered a polygraph examination by a fully certified and experienced DoD examiner using standard rules of test protocol. The examination, like all others in the Air Force, was authenticated by quality control supervisors conducting "blind" reviews, both at the field and headquarters polygraph program office levels before it was finalized with a No Deception Indicated assessment.

Its purpose is twofold: (1) to qualify DoD and non-DoD federal personnel for careers as forensic psychophysiologists, (2) to provide continuous research in forensic psychophysiology and credibility assessment methods. The Institute's *Basic Courses in Forensic Psychophysiology* is the only program known to base its curriculum on forensic psychophysiology and conceptual, abstract, and applied knowledge that meets the requirements of a master's degree-level of study. AFOSI Pam. 71-125, *supra*, at 18.

[27] C. Honts & M. Perry, *Polygraph Admissibility Changes and Challenges*, 16 Law & Human Behavior 357, 370 (1992).

[28] DoD Directive 5210.48 states that every polygraph examiner candidate must be a U.S. citizen; be 25 years old; have graduated from an accredited 4-year college (or equivalent) plus have 2 years as an investigator with a U.S. government or other law enforcement agency; be of high moral character and sound emotional temperament, based upon a background investigation; and, finally, be judged suitable for the position after successfully taking a polygraph examination.

Though petitioner argues that polygraph testing should be the subject of an absolute exclusionary rule, such an argument fails to acknowledge the validity of such testing, especially within the United States Government itself.[29] As reported to Congress in fiscal year 1996, the DoD conducted 12,548 examinations, with 21.5% occurring during a criminal investigation and another 4.6% occurring at the specific request of a criminal suspect for exculpation purposes. *Ibid.* at 1. These annual reports reflect a tremendous reliance upon polygraph testing to resolve issues ranging from a small bank theft to espionage allegations affecting national security. See also *Cooke v. Orser*, 12 MJ 335 (CMA 1982).

The *per se* bar of Mil. R. Evid. 707 ignores the voluminous research showing polygraph testing is accurate and reliable when used by highly trained examiners employing well-accepted techniques, such as CQT in criminal investigations. A critical analysis of the literature reveals discrete and differing opinions about the accuracy of polygraph testing, depending upon the type of technique employed and qualifications of the examiners conducting the various tests. See generally, J. Matte, *Forensic Psychophysiology Using the Polyrgraph*, Pp. 102-155 (1996). Lumping the techniques and research together to advance a broad conclusion about the accuracy of polygraph testing is inappropriate and reveals the fundamental flaw behind Mil. R. Evid. 707's blanket ban of polygraphs, a

[29] The Department of Justice continues to support the use of polygraph examinations as an "investigatory tool" while "oppos[ing] all attempts by defense counsel to admit polygraph evidence or to have an examiner appointed by the court to conduct a polygraph test." Government attorneys are instructed to "refrain" from seeking admission of favorable examinations, yet such attorneys are free to offer any voluntary admissions or confessions obtained by use of this polygraph. Department of Justice Policy 9-13.310. Mil. R. Evid. 707 also allows admission of any otherwise admissible statements or confessions obtained in the course of a polygraph examination against an accused.

ban so absolute it even bars the mention of the word "polygraph" in a courts-martial.

This Honorable Court has not looked favorably upon *per se* exclusionary rules involving a concern that evidence may be unreliable. In *Manson v. Brathwaite*, 432 U.S. 98 (1977), this Court was presented with the "issue as to whether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability [in this case], of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary." 432 U.S. at 99. The defendant argued that "identification evidence is so convincing to the jury that sweeping exclusionary rules are required. Fairness of the trial is threatened by suggestive confrontation evidence, and thus, it is said, an exclusionary rule has an established constitutional predicate." *Id.* at 111. The Court rejected a *per se* rule, stating that such a rule "goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant." *Id.* at 112. Certainly, inflexible rules of exclusion that may frustrate rather than promote justice have not been viewed recently by this Court with unlimited enthusiasm." *Id.* at 113. "It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness—an obvious example being the testimony of witnesses with a bias." *Id.* at 113 n.14.

In *Barefoot v. Estelle*, 463 U.S. 880 (1983), this Court was presented with an issue involving the admissibility of psychiatric testimony during the sentencing phase of a trial, where the psychiatrist was allowed to provide his "expert" opinion about the "future dangerousness" of the defendant. The defendant argued that admission of psychiatric testimony regarding future dangerousness of individuals was so inherently unreliable that its admission against a defendant was unconstitutional.

This Court rejected the defendant's argument:

> Acceptance of petitioner's position that expert testimony about future dangerousness is far too unreliable to be admissible would immediately call into question those other contexts in which predictions of future behavior are constantly made . . . .
>
> In the second place, the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party. Psychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but also as generally so unreliable that it should be ignored . . . .
>
> . . . Indeed, as this case and others indicate, there are those doctors who are quite willing to testify at the sentencing hearing, who think, and will say, that they know what they are talking about, and who expressly disagree with the Association's point of view [that such testimony is unreliable] . . . . If they are so obviously wrong and should be discredited, there should be no insuperable problem in doing so . . . . Neither petitioner nor the Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time. Yet the submission is that this category of testimony should be excised entirely from all trials. We are unconvinced . . . .

Id. at 898-899.[30]

The concern that evidence may be unreliable in certain situations does not warrant a per se ban on admissibility in all situations.

B. Polygraph Evidence Does Not Mislead Or Confuse Juries, Nor Do Juries Give Polygraph Evidence Undue Weight

The first three reasons advanced by the drafters of Mil. R. Evid. 707 deal with a belief that juries will rely too much upon polygraph evidence; their province to determine guilt will be invaded, and they will become confused about the issues in the case.[31] These reasons are not supported by studies involving civilian juries. Further, they disregard the President's confidence in the unique ability of court-members to deal with complex issues in courts-martial. Moreover, these concerns undermine confidence in the adversarial criminal justice system, as expressed by this Honorable Court.

(1) Polygraph Evidence Does Not Mislead or Confuse Juries

Scientific studies have shown that juries are not unduly influenced or confused by polygraph evidence. See *United*

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[30] Respondent agrees inherently unreliable evidence may not be constitutionally required to be admitted. *Rock*, 483 U.S. 44, 62 (1987) (Rehnquist, C.J., White, J., O'Connor, J., Scalia J., dissenting). "Inherent" is defined in Webster's Dictionary as "involved in the constitution or essential character of something: belonging by nature or settled habit." Webster's Ninth New Collegiate Dictionary 622 (1991). Polygraph evidence, however, is clearly not "inherently" unreliable for what it purports to measure.

[31] Contrary to the drafters' analysis, a jury does not, of course, determine innocence. It acquits based upon the prosecution not meeting its burden of proof.

States v. Piccinonna, 885 F.2d 1529, 1533 n. 14 (11th Cir. 1989) (citing three studies). In one study, 19 lawyers who participated in 220 criminal cases in Wisconsin court rooms between the years 1976 and 1979—when polygraph evidence was admissible in criminal trials pursuant to stipulation between the prosecution and defense—responded to a survey about its impact. *Not one* lawyer felt polygraph testimony disrupted the trial. Only two of the nineteen lawyers believed the jury disregarded other significant evidence (other than the testimony of the defendant) because of the use of the polygraph. R. Peters, *A Survey of Polygraph Evidence in Criminal Trials*, 68 American Bar Association Journal 162 (1982).

Another study analyzed the case of *United States v. Grasso*, a case tried in United States Federal Court, Boston, Massachusetts, in June 1973. In this case, the defendant offered an exculpatory polygraph in support of his alibi defense. This evidence went to the jurors, and the defendant was acquitted. After trial, lawyers interviewed eight of the twelve jurors to determine the effect of the polygraph evidence. The jurors stated they were not unduly influenced by the polygraph evidence. F. Barnett, *How Does A Jury View Polygraph Examination Results*, 2 Polygraph 275 (1973).[32] See also *State v. Porter*, 241 Conn. 57, __A.2d__ (1997) ("[w]e acknowledge, however, that other commentators have specifically asserted that juries will not be overly impressed by such evidence. At present, empirical data regarding the impact of scientific testimony on juries is almost entirely lacking"); *State v. Dean*, 103 Wis. 2d 228, 276, 307 N.W.2d 628, 652 (1981) ("[w]e have no empirical data as to . . . the influence of polygraph evidence on the conduct of the trial or on the jury verdict"). In the face of this evidence (or lack thereof), a *per se* rule of evidentiary

[32] Respondent assumes that, despite overwhelming evidence to the contrary, juries universally decided cases consistent only with the polygraph evidence admitted. As noted, however, the few studies that have been conducted on this issue have shown to the contrary.

exclusion based upon a concern that juries in all cases will be "confused" or unduly swayed is not justified.

Additionally, the unique qualifications of military court members, make it unlikely they would be unduly influenced or confused by polygraph evidence, particularly in the respondent's case, with a court panel of military officers.[33] The adoption of other rules of evidence for military courts-martial show that the President has the utmost confidence that court-members will not be confused or misled by expert testimony. In fact, when the drafters wrote Mil. R. Evid. 704 allowing an expert to testify concerning the ultimate issue in a case (contrary to the Federal Rule) they justified this difference based on the sophistication of military court members. "The statutory qualifications for military court members reduce the risk that military court members will be unduly influenced by the presentation of ultimate opinion testimony from psychiatric experts." MCM, United States, 1984, (1995 ed.) App. 22, p. A22-46.

This Honorable Court has also expressed confidence in the ability of juries to separate the wheat from the chaff regarding scientific evidence:

> We conclude by briefly addressing what appear to be two underlying concerns of the parties and *amici* in this case. Respondent expresses

[33] Article 25(d)(2), 10 U.S.C. 825, states in pertinent part: "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Generally, court-martial panels are comprised of military officers, although enlisted personnel may serve at the accused's request. All officers detailed to courts-martial have at least a bachelors degree, and many have graduate degrees. Almost without exception, enlisted personnel detailed to a panel have a high school degree, and many have more advanced degrees. See *United States v. Curtis*, 44 MJ 106, 171 (1996) (Sullivan, J., concurring) ("The military jury is hard to fool and its intelligence should not be underestimated.")

> apprehension that abandonment of "general acceptance" as the exclusive requirement for admission will result in a "free-for-all" in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions. In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury, and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

Daubert, 509 U.S. at 595, quoting *Rock*, 483 U.S. at 61 (1987).

Finally, approximately 30 jurisdictions in the United States (22 states plus 8 federal circuits) allow for the admission of polygraph evidence by stipulation or otherwise.[34] Petitioner provides no direct evidence that the admission of polygraph results in those jurisdictions has confused or misled juries.

(2) Polygraph Evidence Does Not Intrude On Traditional Functions Performed By The Jury

The drafters were also concerned that the use of polygraph evidence would preempt the court-members' "traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence. . . . " MCM at App. 22, p. A22-48. Petitioner further argues that the admission of polygraph evidence intrudes on the credibility determination of the trier of fact. Brief for Petitioner, at 27. These arguments are not persuasive.

[34] The admissibility of polygraphs in the state and federal jurisdictions will be discussed *infra*.

The petitioner specifically argues that juries weigh credibility of witnesses based on first-hand observation of witnesses. Brief for Petitioner, at 28. In our evidentiary system, factfinders are not limited to only *first-hand* observation of witnesses in making credibility determinations. Other evidence which helps the jury assess the credibility of witnesses is routinely admitted, e.g. character for truthfulness/untruthfulness; bias evidence; evidence of prejudice; prior inconsistent statements; prior consistent statements; prior convictions, motive to misrepresent; post-traumatic stress/rape trauma syndrome testimony; and child sexual abuse accommodation syndrome, *etc.* "[W]e allow the prosecution to introduce expert testimony, which is far less reliable than the polygraph, to bolster the credibility of the state's case in other situations."[35] *State v. Porter*, 241 Conn. 57, __A.2d__ (Conn. 1997) (Berdon, J., dissenting) (citing cases where expert testimony was admitted to show typical behavior patterns of victims of various assaults).

The Child Sexual Abuse Accommodation Syndrome is one such example. The controversial nature of this syndrome and expert disagreement as to its utility have not precluded the prosecution from using it to assist the fact finder in determining an alleged victim's credibility. *United States v. Suarez*, 35 MJ 374, 376 (CMA 1992), citing Myers, *et al*, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1 (1989); *Hall v. State*, 611 So.2d 915 (Miss. 1992) (expert testified that behavior of alleged victim was common for a sexually abused child). In the face of admission of this evidence, it is arbitrary and unreasonable to limit exculpatory polygraph

[35] Testimony by an expert concerning post-traumatic stress syndrome and rape trauma syndrome testimony is designed to bolster the credibility of the victim. In such a case, the expert is testifying that a rape/child abuse victim frequently exhibits certain symptoms, as does the alleged victim. Such testimony directly makes the alleged victim more "credible" in the eyes of the expert and the jury. See *State v. Steven G.B.*, 204 Wis. 2d 108, 552 N.W.2d 897 (Wis. Ct. App. 1996) and cases cited therein.

evidence by an accused after he testifies based upon an argument that such evidence "duplicates" a jury's credibility-assessing function.[36]

Further, polygraph evidence does not provide the ultimate determination of guilt for the jury. The polygraph examiner would only testify that the responses to relevant questions indicated "no deception," not that, in the examiner's opinion, the examinee did not commit the crime alleged. Petitioner also argues that Fed. R. Evid. 704(b) does not allow an expert witness testifying with respect to the mental state or condition of a defendant to opine whether the defendant did or did not have a mental state or condition constituting an element of the crime charged. Brief for Petitioner, at 29. As noted earlier, in the military, experts *are* allowed to provide "ultimate opinion" testimony. *United States v. Benedict*, 27 MJ 253 (CMA 1988). See Mil. R. Evid. 704. Such testimony has not been shown to overwhelm military court-members nor has it usurped their fact-finding role. Further, state courts have admitted expert testimony regarding an expert's belief as to the truth of an allegation. See *State v. Elm*, 201 Wis. 2d 452, 549 N.W.2d 471 (Wis. Ct. App. 1996) (expert replied to question as to cause of medical condition "[m]y opinion is that she was molested"); *State v. French*, 233 Mont. 364, 760 P.2d 86 (1988) (noting that a school counselor could offer opinion testimony that a six year old victim was telling the truth).

Finally, juries will not have the mistaken belief that a polygraph expert has independently conducted an investigation and determined the truth for the jury. See, e.g., *United States*

[36] Amici for the Petitioner, Criminal Justice Legal Foundation, argues that in order to admit exculpatory polygraphs, inculpatory polygraphs would also have to be admitted because, if not, a defendant would have nothing to lose. This argument has no basis in fact. Plenty of suspects, who later confess, fail polygraphs in jurisdictions that do not allow polygraphs to be admitted, as noted by Amici. Brief, *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner, at 19, 20.

v. Adkins, 5 USCMA 492, 18 CMR 116 (1955) (discussing one of the policy reasons for prohibiting a witness from commenting on the truth of the allegations). The jury will understand the circumstances under which the examiner is testifying, having been educated to the risks of polygraph evidence through expert testimony, cross examination, and cautionary instructions by the judge. See *Barefoot,* 463 U.S. at 901; *Rock*, 483 U.S. at 61. The results of a polygraph provide court members with highly relevant information to help *them* determine the credibility of the witness. The concern that polygraph evidence constitutes "ultimate opinion testimony" is not valid.

C. The Admission Of Polygraph Evidence Is Neither A Waste Of Time Nor A Substantial Burden On The Criminal Justice System

Petitioner contends that allowing an accused the opportunity to lay a foundation for the admission of polygraph evidence can result in a substantial waste of time and that polygraph evidence places a burden on the administration of justice that outweighs the probative value of the evidence. Brief for Petitioner, at 29, 30. This argument ignores the fact that highly technical, time consuming, scientific evidence is admitted *against* accuseds every day in our criminal justice system. Today, the Armed Forces routinely prosecute complex urinalysis cases, such as the one in the case *sub judice*. In a litigated urinalysis case, such as respondent's, the prosecution is required to call an expert witness to explain the scientific test results to the fact-finder and lay a proper foundation for their admission. *United States v. Hunt*, 33 MJ 345 (CMA 1991). This is the only evidence required to prove an accused knowingly used drugs. Typically, an accused offers his own expert witness. Such cases are procedurally complex, highly technical, and can be very costly to try. Similarly, the Armed Forces and prosecutors have welcomed with open arms the use of

DNA evidence in courts-martial, with all of its "procedural complexities." *United States v. Thomas*, 43 MJ 626 (AF Ct. Crim App 1995).

Courts admit testimony of "Drug Recognition Experts" regarding "horizontal gaze nystagmus" (HGN) (purporting to identifying drivers under the influence of drugs or alcohol by noting the rapid involuntary horizontal oscillation of their eyes when attempting to follow a target). See *State v. Klawitter*, 518 N.W.2d 577 (Minn. 1994) (court admitted HGN testimony despite the fact the evidentiary hearing required the testimony of 14 witnesses); *State v. Williams*, 388 A.2d 500 (Me. 1978) ("extensive preliminary hearing" required before admitting spectrography voiceprint analysis).

Studies have also shown that courts admitting polygraph evidence are not unduly burdened by evidentiary hearings. See Peters, *A Survey of Polygraph Evidence in Criminal Trials, supra.* (Survey of 11 cases where experts testified regarding polygraph evidence showed that such testimony consumed, at most, 5 hours of trial time).

Prosecutors and courts cannot be expected to allow "procedural complexities" at trials to perfect the government's case, while denying an accused the opportunity to present a defense. Mil. R. Evid. 707 arbitrarily limits admission of evidence by the defense to a greater degree than by the prosecution. As such, it is an invalid, disproportionate limitation upon a accused's right to present a defense.

Nothing further demonstrates this point than the circumstances of this particular case. The respondent's AFOSI polygraph was taken at the request of the government. Because it was conducted by a certified government polygraph examiner, the examiner's expertise and the reliability of his technique were not at issue. Therefore, the admission of polygraph evidence in this case would not have wasted the court's time or burdened the military justice system.

D. There Is No Widespread Judicial Support For A *Per Se* Prohibition On Polygraph Admissibility

Petitioner argues that "the general rule in most States is that the results of polygraph examinations are inadmissible in criminal trials, primarily because of the lack of adequate scientific support for their reliability." Petitioner further argues that "no court of appeals, however, has concluded that polygraph testing is scientifically valid or that the results of a polygraph test were reliable enough to be admitted into evidence." Brief for Petitioner, at 31, 34. *Amici* argue that "the majority of States have an analogous [to Mil. R. Evid. 707] exclusion of polygraph evidence [rule]." Brief for the State of Connecticut and 27 States as Amici Curiae in Support of Petitioner, at 4. A careful review of these states' cases, however, demonstrates that there is no widespread support for a *per se* polygraph exclusion rule.

In the federal system, eight jurisdictions currently allow the results of a polygraph to be admitted, under certain circumstances, if a proper foundation is laid. See *United States v. Lynn*, 856 F.2d 430 (1st Cir. 1988) (judge's discretion); *United States v. Kwong*, 69 F.3d 663, 667-669 (2d Cir. 1995) (judge's discretion), cert denied, 116 S.Ct. 1343 (1996); *United States v. Posado*, 57 F.3d 428 (5th Cir. 1996) (judge's discretion); *United States v. Sherlin*, 67 F.3d 1208, 1216, 1217 (6th Cir. 1995) (unilateral polygraphs not admissible, judges discretion); *United States v. Olson*, 978 F.2d 1472 (7th Cir. 1992) (judge's discretion); *Anderson v. United States*, 788 F.2d 517, 519 n.1 (8th Cir. 1986) (by stipulation); *United States v. Williams*, 95 F.3d 723 (8th Cir. 1996) (judge's discretion); *United States v. Cordoba*, 104 F.3d 225, 227-228 (9th Cir. 1997) (judge's discretion); *United States v. Piccinonna,* 885 F.2d at 1529 (11th Cir. 1989). The remaining four jurisdictions generally do not admit polygraph evidence. The Tenth Circuit seems to apply an abuse of discretion standard and has allowed polygraph results to be

admitted only in limited circumstances. See *Palmer v. Monticello*, 31 F.3d 1499 (10th Cir. 1994). The D.C. Circuit excludes the results of polygraphs based on its 70 year old *Frye* holding. *United States v. Skeens*, 494 F.2d 1050 (D.C.Cir. 1974). In 1991, the Fourth Circuit noted the serious constitutional concerns involving a *per se* rule of inadmissibility of polygraph evidence, when offered by an accused, but left issue unresolved. *United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1134 n.4 (4th Cir. 1991). Finally, the Third Circuit has not directly addressed the question, but seems to allow polygraph evidence in rebuttal. *United States v. Johnson*, 816 F.2d 918 (3rd Cir. 1987) (evidence concerning polygraph examination may be introduced to rebut assertion of coerced confession).

Twenty two states allow polygraph evidence to be admitted in their jurisdictions in one form or another. See Brief for the State of Connecticut and 27 States as Amici Curiae in Support of Petitioner, at 5, n 1. Twenty seven states plus the District of Columbia currently do not allow for the admission of polygraph evidence in criminal proceedings. *Ibid.*, at 4, n 1.[37] Vermont has not spoken on the subject. However, in *State v. Hamlin*, 146 Vt. 97, 109, 499 A.2d 45, 54 (1985), the State agreed that the admission of polygraph evidence was within the discretion of the trial judge.

The states that exclude polygraph evidence can be divided into two general categories. The majority of these states apply

[37] Eleven of the State's Attorney General who support the amicus brief on behalf of petitioner do not have *per se* rules in their states against laying a foundation for the admission of polygraph evidence analogous to Mil. R. Evid. 707. See *Wingfield v. State*, 303 Ark. 291, 796 S.W.2d 574 (1990); *People v. Fudge*, 7 Cal. 4th 1075, 875 P.2d 36 (1994); *Holcomb v. State*, 268 Ark. 138, 594 S.W.2d 22 (1980); *Melvin v. State*, 606 A.2d 69 (Del. 1992); *Cassamassima v. State*, 657 So.2d 906 (Fla. Dist. Ct. App. 1995); *Forehand v. State*, 477 S.E.2d (Ga. 1996); *Sanchez v. State*, 675 N.E. 2d 306 (Ind. 1996); *State v. Weber*, 260 Kan. 263, 918 P.2d 609 (1996); *State v.*

the *Frye* general acceptance test.[38] Implicit in excluding polygraph evidence under the *Frye* test is the understanding that in any particular case, a party can attempt to show that polygraph evidence has been generally accepted and is admissible. In fact, studies indicate that the relevant scientific community *does* very substantially, if not even "generally," accept polygraph evidence as helpful. See McCall, *Misconceptions and Reevaluation—Polygraph Admissibility After Rock and Daubert*, U. Ill. L. Rev. 420 (1996) (1982 and 1992 studies showed that 60% and 80%, respectively, of psychophysiologists believed the modern polygraph technique was useful when considered with other evidence). Therefore, states applying the *Frye* test, even with their reluctance to admit polygraph evidence, do not go as far as Mil. R. Evid. 707, which prevents an accused from even *attempting* to lay the foundation for his exculpatory polygraph, taken under circumstance assuring its reliability.

The remaining states hold that polygraph evidence is *per se*

Cantanese, 368 So.2d 975 (La. 1979) (admissible in post-trial proceedings); *Dominques v. State*, 917 P.2d 1364 (Nev. 1996); *State v. Wright*, 471 S.E.2d 700 (S.C. 1996); *State v. Renfro*, 96 Wash. 2d 902, 639 P.2d 737, cert. denied, 459 U.S. 842 (1982). *Amici* imply that Mississippi does not have a *per se* bar to the admission of polygraph results at trial. Brief of the State of Connecticut and 27 States, at 5 n.1. This is incorrect, as it does. Mississippi, however, does allow evidence that a witness was *willing* to take a polygraph (but not the results) to be admitted in order to rehabilitate an impeached witness. *Connor v. State*, 632 So.2d 1239 (Miss. 1993). Since Mil. R. Evid. 707 does not even allow polygraphs to be mentioned for that purpose, respondent will count Mississippi among those jurisdictions that have polygraph rules contrary to Mil. R. Evid. 707.

[38] See e.g. *Dowd v. Calabrese*, 585 F.Supp. 430 (D.D.C. 1984) (defendants offering polygraph results bear burden of showing that the conditions which led to judicial rejection of polygraphs under *Frye* no longer exist); *People v. Angelo*, 88 N.Y. 2d 217, 666 N.E.2d 1333 (1996) (must show general scientific acceptance of test); *State v. Hamlin*, 146 Vt. 97, 499 A.2d 45 (1985) (must show acceptance in scientific community).

inadmissible because they believe it to be unreliable too prejudicial, or an undue burden on the judicial system.[39] Courts that exclude polygraph evidence based on its unreliability, however, improperly require near perfect accuracy rates for polygraph tests, something that is not required for other evidence.[40] See *Rock*, 483 U.S. at 61; *Barefoot*, 463 U.S. at 898; *Manson*, 432 U.S. at 13. This requirement ignores the fact that DNA evidence, handwriting analysis, eyewitness testimony, and other types of evidence may be very unreliable in a particular case, but are nonetheless admissible. *State v. Sims*, 52 Ohio Misc. 31, 47, 369 N.E.2d 24, 34 (1977); See *Quaker City Hide Company and Edward E. Goldberg & Sons, Inc. v. Atlantic Richfield Company*, 10 Phila. 1, 1983 Phila. Cty. Rptr. LEXIS 2 (Pa. Comm. Pleas Ct. Phila. Co. 1983); *J. Widacki & F. Horvath, supra*.

Further, as previously discussed in Section IIA, *supra*, numerous studies have found polygraph evidence to be very accurate. Federal and local governments, including prosecutors, rely on polygraphs to make critical decisions every day. The Department of Defense alone conducted over 370,000 poly-

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[39] See, e.g. *State v. Porter*, 241 Conn. 57, ___ A.2d ___ (Conn. 1997) (always too prejudicial); *Morton v. Commonwealth*, 817 S.W.2d 218 (Ky. 1991); *State v. Opsahl*, 513 N.W. 2d 249 (Minn. 1990), But see *State v. Schaeffer*, 457 N.W.2d 194 (Minn. 1990); *State v. Staat*, 811 P.2d 1261 (Mont. 1991) (unreliable); *State v. Ober*, 493 A.2d 493 (N.H. 1985) (*per se* unreliable and jury will rely on polygraphs too much); *Paxton v. State*, 867 P.2d 1309 (Okla. 1994) (unreliable); *State v. Campbell*, 904 S.W.2d 608 (Tenn. Ct. App. 1995) (inherently unreliable); *State v. Beard*, 461 S.E.2d 486 (W. Va. 1995) (unreliable, reviewed *Daubert*); *State v. Dean*, 103 Wis. 2d 228, 307 N.W.2d 628 (Wis. 1981) (burden on judicial system. Court finds polygraph evidence, however, has "a degree of validity and reliability"); *Robinson v. Commonwealth*, 231 Va. 142, 341 S.E.2d 159 (1986) (unreliable); *In re Odell*, 672 A.2d 457 (R.I. 1996) (rule based on *Frye*, but also inadmissible under *Daubert* because not reliable).

[40] "Critics of polygraph evidence seem to forget that no evidence can be said to be one hundred percent accurate." J. Canham, *Military Rule of Evidence 707: A Bright Line Rule That Needs to be Dimmed*, 140 Mil. L. Rev. 65 (1993).

graph examinations between the years 1981 and 1996. Fiscal Years 1986-1996, DoD Polygraph Program *Annual Polygraph Report to Congress*, Office of the Assistant Secretary of Defense (OASD) for Command, Control, Communications, and Intelligence (C3I); *Quaker City Hide Company, supra* (noting polygraphs are widely used with confidence by the military, federal, state, and local law enforcement agencies, and other institutions all over the country); *Paxton v. State*, 867 P.2d 1309, 1323 (Okla. 1994) (charge was dismissed "to best meet the end of justice . . . . Defendant cleared by polygraph test"); *State v. Steven G.B.*, 204 Wis. 2d 108, 552 N.W.2d 897 (1996) (Sundby, J., concurring) (noting district attorneys use polygraph evidence to make charging decisions); *People v. McCormick*, 859 P.2d 846 (Colo. 1993) (prosecutors require that agreements to take polygraphs be included in plea agreements in order to "unequivocally demonstrate" that a defendant is truthful).

Finally, numerous state courts have found polygraph evidence to be reliable. See *Commonwealth v. Mendes*, 547 N.E.2d at 36 (trial court found polygraph evidence valid); *State v. Porter*, 241 Conn. 57, ___ A.2d ___ (polygraph evidence has enough demonstrated validity to pass *Daubert* test). There is no widespread judicial support for a *per se* prohibition on polygraph evidence and even among those states that prohibit the introduction of polygraph evidence, no consensus exists justifying such a ban.

E. The Experience Of New Mexico With Its Open Polygraph Admissibility, Rule Refutes The Reasons Advanced For The Promulgation of Military Rule of Evidence 707

In *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (N.M. 1975), the Supreme Court of New Mexico ruled that polygraph evidence would thereafter be admissible in New Mexico without the requirement of a prior stipulation between the parties. The

Court found that its previous stipulation requirement, created because of concerns about the reliability of polygraphs, was "mechanistic in nature," "inconsistent with the concept of due process, " and "[r]epugnant to the announced purpose and construction of the New Mexico Rules of Evidence." "These rules shall be construed to secure fairness in administration * * * and promotion of growth and development of the law of evidence . . . ." *Id.* at 205. Cf. Mil. R. Evid. 102; Fed. R. Evid. 102.

In 1983, the Supreme Court of New Mexico promulgated Rule of Evidence 11-707, which established procedural requirements for the admission of polygraph evidence. N.M. Stat. Ann. § 11-707 (Michie 1993). Among other requirements, the rule requires a party wishing to admit polygraph evidence provide 30 days notice before trial and provide the opposing party with all documents related to the polygraph he or she wishes to admit, including any past polygraphs taken by the examinee. The rule also provides definitions of key polygraph terms, minimum training requirements for polygraph examiners, and procedures that must be complied with during the giving of the examination. N.M. Stat. Ann. § 11-707. The purpose of the rule, other than the obvious benefit of providing uniformity, is to prevent surprise and give the opposing party an opportunity to collect rebuttal evidence. *State v. Baca*, 120 N.M. 383, 388, 902 P.2d 65, 70 (1995). Although the rule establishes requirements before polygraph results are admissible, the Supreme Court of New Mexico has refused to follow a mechanical application of the rule (such as the notice requirement). 902 P.2d at 70.

Concerns about the reliability of polygraphs and its effect upon a jury have been the subject of many studies, both in the laboratory and in the "field." Petitioner has cited to this Court, as has respondent, many of those studies. New Mexico, however, has admitted polygraphs without significant restriction (such as prior stipulation) for the past 22 years. Petitioner

cites to no study or case law from New Mexico showing that polygraphs have proven to be inherently unreliable, a burden upon the criminal justice system, confusing to juries, or that they have usurped the jury's fact-finding role. On the contrary, New Mexico's experience directly rebuts the reasons advanced for the creation of Mil. R. Evid. 707.

III. Military Rule Of Evidence 707 Is Not Entitled To Deference By This Court

"When we assumed the Soldier, we did not lay aside the Citizen."— George Washington[41]

Petitioner argues that in the context of the military, a servicemember challenging a rule of evidence has an "extraordinarily weighty" burden in "overcom[ing] the balance struck by Congress" citing *Weiss v. United States*, 510 U.S. 163, 177-178 (1994). Brief for Petitioner, at 14.

Respondent disagrees with this analysis. On the contrary, the burden is on the United States to justify its *per se* evidentiary rule of exclusion: "Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of *all* posthypnosis recollections." *Rock,* 483 U.S. at 61. The standard in *Weiss* does not apply here because the President did not promulgate Mil. R. Evid. 707 out of a concern for "balancing the rights of servicemen against the needs of the military . . . . " *Weiss*, 510 U.S. at 177. None of the reasons set forth in the drafter's analysis to Mil. R. Evid. 707 indicates the rule was created out of a concern for the unique nature or structure of the military.

Further, in Mil. R. Evid. 702, which was adopted in the early 1980s, the President *eliminated* what had been a *per se*

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[41] Address to the New York Legislature, 26 June 1775, as cited in *The Columbia Dictionary of Quotations*, 1993.

policy excluding the results of polygraphs at courts-martial.[42] The previous provision stated that "[t]he conclusions based upon or graphically represented by a polygraph test and conclusions based upon, and the statements of the person interviewed made during a drug induced or hypnosis-induced interview are inadmissible evidence."[43] MCM, United States, 1969, Para 142e. The Analysis to Mil. R. Evid. 702 further notes (in regard to polygraphs),

> Clearly, such evidence must be approached with great care. Considerations surrounding the nature of such evidence, any possible prejudicial effect on a fact finder, and the degree of acceptance of such evidence in the Article III courts are factors to consider in determining whether it can in fact "assist the trier of fact."

MCM, United States, 1984, App. 22, p. A22-45. If the President was not concerned about balancing the needs of the servicemember with the needs of the military when creating a rule of evidence, no special deference to the creation of the rule should be given.

Petitioner notes that Article 36 of the Uniform Code of Military Justice, 10 U.S.C. §836, authorizes the President to proscribe rules of evidence for courts-martial. Brief for Petitioner, at 42. Article 36 allows the President "so far as he considers practicable, [to] apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts." A *per se* rule of inadmissibility regarding polygraph evidence, however, is not a "generally recognized" rule of evidence. As discussed, most of the federal circuits do not have a *per se* rule of exclusion regarding polygraph evidence, let alone a *per se* rule that does not even allow an

[42] See *United States v. Helton*, 10 MJ 820 (AFCMR 1981).

[43] The previous *per se* bar in the military to hypnotically induced testimony of a defendant would today be ruled unconstitutional in light of *Rock*.

accused the opportunity to attempt to lay a foundation for the admission of this exculpatory scientific evidence, or even permit the mention of the word "polygraph." The military justice system stands essentially alone with its draconian polygraph rule.[44]

Petitioner contends that the Court of Appeals' opinion does not reflect consideration that the military is a specialized society separate from civilian society, and argues that the costs associated with offering polygraph evidence are unwarranted and onerous for the military. Brief for Petitioner, at 39-43. This argument fails to recognize the role of the Court of Appeals for the Armed Forces in the military justice system, the reasons articulated by the President for the promulgation of Mil. R. Evid. 707, and the nature of the case launched by the prosecution against the respondent at his court-martial.

The Court of Appeals for the Armed Forces is uniquely qualified to consider the special requirements and concerns of the Armed Forces, a task it has been doing for the past 46 years. The Court was specifically created to safeguard the rights of servicemembers. In creating the UCMJ and the present appellate structure in 1950, Congress increased oversight of the military justice system. As Congressman Philbin from Massachusetts noted about the then named Court of Military Appeals:

> [I]t is entirely disconnected with the Department of Defense or any other military branch, completely removed from any outside influences. It can operate, therefore, as I think every Member of Congress intends it should, as a great, effective, impartial body sitting at the

[44] The "arbitrary" standard adopted by the Air Force Court of Criminal Appeals in the case *sub judice* is not the correct test for upholding *per se* rules of evidentiary exclusion. Such a low threshold would allow the President to promulgate just about any evidentiary rule of exclusion, since such rules would not be arbitrary so long as they were based on some assumption supported by other authority, however slight.

> top-most rank of the structure of military justice and insuring as near as it can be insured by any human agency, absolutely fair and unbiased consideration for every accused. Thus, for the first time this Congress will establish, if this provision is written into law, a break in command control over court-martial cases and civilian review of the judicial proceedings and decisions of the military.

95 Cong. Record 5726 (1949). Because of this unique charter, this Honorable Court should give great deference to the Court of Appeals' determination that, in the context of the military criminal justice system, the reasons set forth for the creation of Mil. R. Evid. 707 did not warrant a *per se* ban on the ability of a military accused to lay a foundation for the admission of exculpatory polygraph evidence. See *Middendorf v. Henry*, 425 U.S. 25, 43 (1976).

In 1976, this Court noted that "[t]he introduction of procedural complexities into military trials is a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline." *Id.* at 45-46. This concern is not valid today. With respect to Air Force trial participants, officers are assigned as military judges, circuit defense counsel, and circuit trial counsel whose sole jobs are to try courts-martial throughout the world.

Petitioner's argument does not take into account that the Air Force, in deciding to prosecute servicemembers solely based upon a positive urinalysis test result, has created a very complex and expensive litigation network. In such cases, the prosecution must call an expert witness to explain the test result to the fact-finder and lay a proper foundation for its admission. The complexities are amply demonstrated by a court member

challenge issue that occurred during the prosecution's case-in-chief in the respondent's case.[45] One court member described the testimony of the prosecution's drug expert as a "course in forensic toxicology." Additionally, an accused is entitled to his own expert and "a battle of the experts" ensues. Such evidence and testimony can be expensive and time consuming. Thus, an argument that the introduction of "procedural complexities" into military trials is a burden to the Armed Forces fails here.

Finally, it is particularly unfair to consider the special needs of the military in respondent's case when the government had two alternative ways to check whether he used drugs—the polygraph examination and the urinalysis. Through its rules of evidence, the government only allowed the urinalysis result to be admitted at respondent's court-martial.

CONCLUSION

The narrowly tailored holding of the Court of Appeals for the Armed Forces must stand. Admission of polygraph evidence is compelled under the facts of Airman Scheffer's case. The government requested the examination, a government certified examiner conducted the examination, and the government attacked Airman Scheffer's credibility after he testified. Military Rule of Evidence 707 precluded Airman Scheffer from even attempting to lay a foundation for the admission of evidence which was critical to his defense.

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[45] The President of the panel was excused from the case after inappropriately discussing the facts with the base Staff Judge Advocate during a trial recess. Record 203. The President had also seemed incredulous that Airman Scheffer would actually plead not guilty in the face of a positive urinalysis test. Record 201. During questioning of the remaining members about their possible partiality, several members felt that they received a "course in forensic toxicology" after hearing the testimony of the prosecution's drug expert. Record 204.

As the Court of Military Appeals noted in *Gipson*:

> In our assessment, the state of the polygraph technique is such that, depending on the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and such other factors as may arise, the results of a particular examination may be as good as or better than a good deal of expert and lay evidence that is routinely and uncritically received in criminal trials. Further, it is not clear that such evidence invariably will be so collateral, confusing, time-consuming, prejudicial, etc., as to require exclusion . . . . Rather, until the balance of opinion shifts decisively in one direction or the other, the latest developments in support of or in opposition to particular evidence should be marshaled at the trial level.

24 MJ at 253.

Mil. R. Evid. 102 states that the rules of evidence "shall be construed to promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Mil. R. Evid. 707 stunts that growth. In 1923, Wigmore wrote "[i]f there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it . . . . Whenever the Psychologist is really ready for the Courts, the Courts are ready for him." 2 J. Wigmore, *A Treatise On The Anglo-American System of Evidence In Trials At Common Law* 875 (2d ed. 1923). In this case, polygraph evidence would not have impeded the discovery of truth in a court of law, but promoted it. The law should run to meet it.

WHEREFORE, the decision of the United States Court of Appeals for the Armed Forces should be affirmed.

Respectfully submitted,

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